United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1396

To be argued by
SARAH S. GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1396

BP/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

SALVATORE VAVOLIZZA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Salvatore Vavolizza appeals from the denial of a motion pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure for an order vacating Vavolizza's guilty plea and conviction on the ground of manifest injustice.

Indictment 63 Cr. 190, in 73 counts, was filed on February 26, 1963 charging the defendant and three others with making false statements to the Immigration and Naturalization Service in connection with applications for first preference immigration visas in violation of 18 U.S.C. § 1001 and with conspiracy to commit this offense in violation of 18 U.S.C. § 371.

The defendant originally pleaded not guilty on March 8, 1963. On Wednesday, October 9, 1968, trial commenced before Judge Tenney and a jury. On Monday, October 14, during the trial, defendant Vavolizza and one co-defendant, Martin Birbano,* moved to withdraw their pleas of not guilty and pleaded guilty to count 1 (the conspiracy count) and count 10 (a substantive false statement count). After a thorough *voir dire* examination conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the court accepted both pleas of guilty.

On February 7, 1969 defendant Vavolizza was sentenced to one year imprisonment, execution of which was suspended, and fined $7,500. The fine was subsequently paid in full.

Statement of Facts

This is an appeal from the denial of the defendant's fifth post-conviction attack on his 1968 guilty plea. The most recent attempt at overturning his conviction is premised on claims (1) that there was an inadequate factual basis for his plea because there was no showing that he knew when he committed his offenses that he was violating the law, and (2) that he was unable to hear the Judge and his attorney at the time of his 1969 sentence and did not therefore realize that his attorney had failed

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* On October 22, 1968, a mistrial was declared as to the remaining two defendants Domenico Quartarolo and Louis P. Bambace, after the jury announced that it was unable to reach a unanimous verdict. The Government later filed orders of *nolle prosequi* as to these defendants.

to follow Vavolizza's directions to move to withdraw his guilty plea.*

Not surprisingly, by the time Vavolizza filed his fifth petition for relief, he had become somewhat repetitive. A tedious review of the earlier proceedings demonstrates that his latest attempt to overturn his well-warranted conviction ** is barred by principles of *res judicata*.

A. The First Petition

On August 11, 1969 Vavolizza filed his first motion seeking to vacate his plea of guilty, his sentence and the judgment of conviction pursuant to 28 U.S.C. § 2255. At that time, Vavolizza argued that the plea did not conform to the standard of Rule 11 of the Federal Rules of Criminal Procedure. Vavolizza also maintained that his counsel, Theodore Krieiger, was involved in a conflict of interest which prejudiced his interests and that his plea was not

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* Vavolizza was represented in the District Court by Attorney Gino E. Gallina, Esq., who moved to be relieved as counsel on appeal. His motion was granted by this Court in an order dated October 6, 1976. Vavolizza has appeared *pro se* on this appeal.

Because of the difficulty in construing Vavolizza's brief, the Government has referred where necessary, to the arguments made by Vavolizza in his District Court brief.

** Defendant played an active and indispensable role in a brazen scheme to secure first preference immigration visas for persons alleged to be urgently needed in the United States by virtue of their high education, technical training, or specialized experience. The *Salvatore Vavolizza Travel Service*, located in White Plains, New York, would act as an intermediary between the immigrant seeking admission to the United States and his prospective employer. In filling out the necessary immigration forms and translating from Italian to English, defendant resorted to subterfuge, false statements and illegal certifications.

voluntary, but rather was the result of his counsel's pressure.*

That motion was denied in a memorandum decision by Judge Tenney on October 16, 1969. (App. 39).

In his decision Judge Tenney found that Vavolizza

> "1) understood the charges which he wished to plead to; 2) conferred with counsel with respect to those charges; 3) *actually committed the acts which he was charged with;* 4) had not been threatened or coerced into entering his plea, but was so voluntarily; 5) had not been promised that any particular sentence would be imposed by the Court if he pleaded guilty; 6) realized that the other counts of the indictment would remain open until the date set for sentencing and all that would remain for the court to do upon its acceptance of the plea would be to impose sentence; and 7) was aware of the maximum sentence to be imposed upon him. *Additionally, the court satisfied itself that there was a factual basis for the plea.*" (Emphasis supplied). (App. 42-43).

On the conflict of interest issue, the court also found that Vavolizza had knowingly and voluntarily accepted the risk of sharing defense counsel.

An appeal was taken from that District Court decision on October 24, 1969. On appeal, in support of his argument that the requirements of Rule 11 were not met,

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* In 1971, Vavolizza brought a malpractice action against Mr. Krieiger. That action was dismissed. *Vavolizza* v. *Krieiger*, 39 App. Div. 2d 446, 336 N.Y.S.2d 748 (1972), *aff'd*, 33 N.Y.2d 351, 352 N.Y.S.2d 919 (1974).

Vavolizza cited this Court to the minutes of his sentencing.* (App. 19). Specifically, he cited to that portion of the minutes in which he had told Judge Tenney that at the time of his offense, he had not realized that he was violating the law.**

In reply to the Rule 11 issue, the Government noted the thorough *voir dire* examination conducted by Judge Tenney before acceptance of the guilty plea. The Government also pointed out that the trial court had satisfied itself from the testimony heard in the first three days of trial that a factual basis existed for the guilty plea.

On February 25, 1970, the Court of Appeals affirmed in open court the District Court decision. Thereafter, Vavolizza's petition for a writ of certiorari to the United States Supreme Court was denied. *United States* v. *Vavolizza*, 63 Cr. 190 (S.D.N.Y. Oct. 16, 1969), *aff'd in open court*, (Mar. 23, 1970), *cert. denied*, 398 U.S. 958 (1970).

B. The Second Petition

In September of 1970, defendant submitted a letter and numerous papers and documents to the District Court which the court construed as a *pro se* motion seeking an *ex parte* order permitting him to withdraw his plea of guilty entered on October 14, 1968.

In this 1970 application, Vavolizza again argued he was "coerced and threatened" into his plea of guilty by

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* Vavolizza also argued on appeal that his plea had been coerced and that he had been denied a speedy trial.

** That portion of the minutes read:

"The Court: Mr. Vavolizza, is there anything you want to add to what your counsel has said?

The Defendant: No, except that if I violated the law I was never aware of it." (App. 35).

his counsel. Vavolizza contended further that the consequences to him and to his business of his plea were never explained to him, citing as examples that his travel agency was dropped from membership in the American Society of Travel Agents and his Notary Public License was cancelled.

The District Court, in a decision dated September 17, 1970, denied this motion for the reasons stated in the court's earlier memorandum decision dated October 16, 1969. (App. 47). No appeal was taken from the September 17, 1970 decision.

C. The Third Petition

Then, in November 1974, five years after his plea of guilty, defendant filed a third motion, pursuant to Rule 32(d), Federal Rules of Criminal Procedure, seeking again to withdraw his plea of guilty and to vacate his conviction to correct manifest injustice. Again, Vavolizza claimed inadequate questioning by the Court under Rule 11. Again, he claimed his guilty plea was coerced. And, for the first time, Vavolizza claimed a hearing problem at the time of the sentence proceedings. Finally, Vavolizza requested that the Judge excuse himself from hearing the motion on the ground that the Court's prior involvement with the case and its previous decisions made it virtually impossible for defendant to obtain a fair hearing.

On March 10, 1975, in a memorandum decision, the Court denied defendant's motion noting that the issues were identical to the two earlier motions and denying the application to recuse himself as unnecessary since the Court of Appeals had already affirmed the Court's previous determination of the issues raised. (App. 48).

D. The Fourth Petition

Thereafter, by letter dated May 19, 1975, defendant, in his fourth application to the District Court asked the Court to reconsider its decision of March 10, 1975 in light of an affidavit filed by Saverio A. Muschio, defendant's attorney at the time defendant entered his plea of guilty.

In that affidavit, dated May 9, 1975, Muschio stated that he was hired to determine the advisability of a motion to withdraw Vavolizza's guilty plea; that he read the plea minutes and determined such a motion would be denied; that he advised Vavolizza of his judgment; that on the morning of sentence Vavolizza "mentioned again his desire to have the guilty plea withdrawn"; that Muschio again suggested they proceed with the sentence; that there was no further discussion of the matter with Vavolizza; that Vavolizza later claimed not to have heard the judge's suggestion to withdraw the guilty plea; and that he had no knowledge of whether Vavolizza had or had not heard the Court's remarks. (App. 51). On May 22, 1975, the Court, specifically allowing the motion for reargument despite its untimeliness, adhered to its prior decisions denying the relief requested. No appeal was taken.

E. The Fifth and Most Recent Petition

Finally, in May of 1976, the motion which is the subject of the instant appeal was made pursuant to Rule 32(d) Federal Rules of Criminal Procedure, seeking once again to vacate Vavolizza's guilty plea, sentence and judgment of conviction to correct manifest injustice. Although Vavolizza claimed that this fifth petition was based upon grounds entirely different from the four prior petitions, the "new" claims were the rather familiar ones that there was no factual basis for his plea under Rule 11

and that he thought his attorney would move to withdraw his plea at the sentencing and could not hear what occurred at that time.

The Government argued below that the claims were not new and that in fact they were *res judicata*. Argument on the motion was requested by defendant and heard by Judge Tenney on September 1, 1976. Thereafter, the judge endorsed the notice of motion, denying it "in all respects".

It is from the denial of this fifth petition that defendant Vavolizza now appeals.

ARGUMENT

POINT I

The Issues Raised on Appeal are Governed by the Doctrine of *Res Judicata*.

The principle of *res judicata* as defined in *Sanders* v. *United States*, 373 U.S. 1 (1963), applies here. *Sanders* sets forth the principles governing the application of *res judicata* to successive applications pursuant to 28 U.S.C. § 2255.

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders* v. *United States*, *supra*, 373 U.S. at 15.

A. The Claim Concerning An Inadequate Factual Basis for the Plea Is Barred.

Vavolizza's very first § 2255 petition in 1969, challenged the adequacy of his guilty plea under the standards of Rule 11 of the Federal Rules Criminal Procedure. In deciding that issue the District Court specifically and conclusively held based upon the files and records of the case that Vavolizza understood the charges, had conferred with counsel concerning the charges, and had actually committed the acts with which he was charged. The Court also specifically held that there was a factual basis for the plea.*

On appeal from that decision, Vavolizza specifically raised the claim that he did not know that he had violated the law and cited the court to be sentencing minutes. The District Court's decision was affirmed and certiorari was denied.

On oral argument of the instant application in the District Court below, Vavolizza again argued that an inadequate factual basis existed for the plea. The District Court stated that it had previously found an adequate factual basis existed in the record, and that, "there was evidence that Mr. Vavolizza knew precisely what the law was but he did not agree with that law and still he chose to violate it." (App. 55). In restating its

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* The files and records of the case included the transcript of the three days of trial, the plea minutes, and the sentencing minutes. Since the issues raised could be resolved on the basis of the record, there was no need for a hearing, and the decision was an adjudication on the merits. See *Sanders* v. *United States*, 373 U.S. 1, 16 (1963); *Moore* v. *Estelle*, 526 F.2d 690, 696-97 (5th Cir.), *cert. denied*, — U.S. — (1976); *Crawford* v. *United States*, 519 F.2d 347, 349-50 (4th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976).

prior finding that Vavolizza was aware of the law which he violated, the District Court placed particular reliance upon the three days of trial testimony prior to Vavolizza's guilty plea, a letter from Vavolizza to the Government stating his opinion concerning aspects of the immigration laws and recommending changes, and a tape recording in which Vavolizza had a lengthy discussion with the Chief of the New York District of Immigration and Naturalization Service again concerning the immigration laws.

There is no question but that the prior findings of the District Court were on the merits and that the same ground is presented in this fifth application as was adversely determined to Vavolizza on his first such application.* The same issue having been decided on the merits and affirmed on appeal must be given controlling weight here. See, *e.g.*, *Kibby* v. *United States*, 524 F.2d 1121 (8th Cir. 1975).

Finally, the ends of justice would most certainly not be served by reaching the merits again on this latest of five applications. There is not only no showing of "manifest injustice", Rule 32(d) Federal Rules Criminal Procedure, but rather a showing that the issue of a factual basis for the plea has been fully and correctly decided.

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* Vavolizza, in the District Court, cited *Sanders*, where the Supreme Court stated that, when doubts exist as to whether or not the grounds previously presented are the same or different, they "should be resolved in favor of the applicant." 373 U.S. at 16. In this instance, there is no such doubt. In both Vavolizza's first and fifth applications, one ground alleged was an inadequate factual basis for the guilty plea. That ground was decided by the District Court in 1969 on the basis of the files and records, affirmed by this Court in 1970 and must, in 1977, be given controlling weight.

B. The Claim Concerning the Conduct of Vavolizza's Attorney at Sentencing Is Also Barred.

Defendant's second claim that he told his attorney, Saverio Muschio, to move to withdraw his guilty plea at the time of sentence, that Muschio did not do so, that Vavolizza did not hear anything that Muschio or the judge said, and that therefore he did not know that Muschio failed to make the motion, aside from being patently frivolous, is also *res judicata*.

Vavolizza first raised this claim in his Rule 32(d) application to the District Court in November of 1974. At that time, his claim was only that he had not heard one comment of the judge at his sentencing concerning the possibility of a motion to withdraw his guilty plea. In March, 1975, based upon the record, that motion was denied. Vavolizza raised the issue again in May of 1975, when he petitioned the Court to reconsider its decision of March 1975. Again, the application was considered by the Court and denied. Vavolizza did not appeal from either of those decisions.

Although Vavolizza's claim has now expanded to a claim that he heard "very little of the proceedings" *

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* Vavolizza Aff. at 2, dated March 17, 1976, attached to Notice of Motion dated May 1976. See App. at 65 where the following colloquy occurred:

> "The Court: Try to stick with the record. There is no indication that he had any trouble with his hearing. There was no statement ever made that he had trouble with his hearing.
>
> There was no request of anybody to speak louder.
>
> Mr. Brenner: There was by Mr. Muccio [sic].
>
> The Court: His attorney made many statements. He only had to hear a portion of it for him to know his attorney was not asking to withdraw the guilty plea.
>
> The attorney was speaking on his behalf in connection with the sentence. You mean to say that he did not hear any of that?
>
> Mr. Brenner: According to his affidavit he did not.
>
> The Court: It is unbelievable. It is incredible."

at his sentencing on February 7, 1969, it is the same ground as was raised in 1974 and in 1975 and decided by the Court. The issue cannot, therefore, be raised again, and the District Court's prior determination must be given controlling weight.

POINT II

An Adequate Factual Basis Existed for Vavolizza's Guilty Plea.

Vavolizza argues that no basis existed in the record from which the Court could find that he was aware of the law at the time he violated it and that therefore there was an inadequate showing that he "knowingly and wilfully" filed false information in a matter within the jurisdiction of a United States department or agency. The merits of Vavolizza's claim are as baseless now as when the claim was first considered seven years ago.

First, it is clear from the record that Vavolizza was fully knowledgeable of the law he violated. As was noted by the District Court at the oral argument of the motion which is the basis of this appeal, Vavolizza was so familiar with the law that he had written a letter to the Government prior to trial recommending that it be changed. In addition, after the third day of trial, but prior to the entry of his guilty plea, Vavolizza had a telephone communication with the chief of the New York District of Immigration and Naturalization which was tape recorded and also demonstrated his knowledge of the law. Finally, prior to accepting Vavolizza's plea, the Court had heard three days of testimony confirming the wilfulness of Vavolizza's offenses. Thus, it is clear that

there was sufficient evidence to indicate that Vavolizza had knowledge of the law.*

However, even assuming in the face of all the contrary evidence that Vavolizza did not know of the existence of the law at the time of his offense, an adequate factual basis nonetheless existed for the guilty plea, since under the statute he violated, 18 U.S.C. § 1001, it is not necessary for a defendant to know the law or intend to break it. To prove a violation, it is only necessary to show that the defendant knowingly and wilfully committed the acts proscribed by the statute, that is, the entry of false information in a matter within the jurisdiction of the Federal Government. See, *e.g.*, *United States* v. *Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976); *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 991 (1971); *United States* v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States* v. *McCue*, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); *McBride* v. *United States*, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956).** It is clear from all these cases that the element of knowledge and wilfulness required by § 1001 relates to the falsity of the statement made and not to a defendant's knowledge of the law nor to any wilful violation of a known legal duty.

Moreover, the cases relied upon by Vavolizza below are not to the contrary. In *United States* v. *Simon*, 425

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* Moreover, at the time of sentencing, Vavolizza stated that after talking with counsel, he believed he had violated the law. (App. 17-18).

** See also *United States* v. *Baumgarten*, 300 F.2d 807 (2d Cir.), *cert. denied*, 370 U.S. 917 (1962). In *Baumgarten*, this Court, while not deciding the issue, cited two cases, *McBride* v. *United States*, 225 F.2d 249, 253 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956) and *Walker* v. *United States*, 192 F.2d 47, 49 (10th Cir. 1951), which hold that "wilful" in the context of § 1001 does not require an evil purpose or knowledge of the law.

F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970), defendants were accountants and the issue of knowledge and wilfulness there considered was whether the defendants knew the financial statements were false and whether they wilfully permitted those false statements to be made by their failure to follow proper accounting procedures. Neither side argued that the defendants had to know the law or "wilfully" intend to break the law. In *United States* v. *Markee*, 425 F.2d 1043 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970), the defendant submitted false corporate records knowing that they would then be used by the company auditors in completing their federal reports. The issue of wilfullness raised in *Markee* was whether it was the defendant's intent to have the false information included in the federal reports. Again, the issue was not the defendant's knowledge of the law or his intent to break the law. In *United States* v. *Weiler*, 385 F.2d 63 (3d Cir. 1967), the Court in dicta stated that proof of an evil motive was required for a violation of 18 U.S.C. § 1001. However, not only is *Weiler* clearly contrary to the settled law in this circuit, but *Weiler's* reliance upon *United States* v. *Palermo*, 259 F.2d 872 (3d Cir. 1958), a tax fraud case, renders the holding suspect. For it is clear that the term "wilfully" has a unique meaning in tax fraud cases. See *United States* v. *Bishop*, 412 U.S. 346, 359-61 (1973); *McBride* v. *United States*, *supra*, 225 F.2d at 254; *cf. United States* v. *Tolkow*, 532 F.2d 853 (2d Cir. 1976).*

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* To the extent Vavolizza's affidavit below can be read to claim that an inadequate factual basis existed for his plea because he did not know that the information he filed was false, such a claim contradicts the record in this case.

At the time Vavolizza entered his guilty plea, the charges were read to him. Vavolizza stated that he had heard them and twice stated that he understood them. Vavolizza stated that he had conferred with his attorney with respect to the charges, had given his attorney all the facts and felt his attorney was in a

[Footnote continued on following page]

POINT III

Vavolizza Was Not Deprived of Effective Assistance of Counsel.

Vavolizza argues that at the time of sentencing he was unaware that his attorney had failed to make a motion to withdraw his guilty plea as he had been instructed. For this reason, Vavolizza claims he was denied the effective assistance of counsel. Vavolizza first made this claim in his third petition filed in March of 1975 some seven years after his sentence and four years after he had sued his first attorney for malpractice. In the face of the record in this case, the claim is, as Judge Tenney stated, "incredible" and "unbelievable." (App. 65).

There is no support whatsoever in the record for Vavolizza argument. It is incredible for him to claim that he did not hear the judge at sentencing, since the record reflects that he answered a series of specific questions from the bench. It is even more incredible to believe that he was not aware of, and did not hear, what his own attorney was saying at the time of his sentence. As Judge Tenney noted at the September, 1976 argument, "There is no indication that [Vavolizza]

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position to advise him with respect to his plea. He further stated that he was guilty and had committed the acts charged against him. The Court stated that, in view of the three days of testimony which it had heard, it was satisfied that Vavolizza was guilty of the charges. At the September, 1976 hearing, Judge Tenney stated again: "I think every element of wilfulness and intent that you can possibly have is established."

Judge Tenney was, of course, entitled to rely upon that record, including Vavolizza's own responses at his pleading and at his sentencing. See, *e.g.*, *Crawford* v. *United States*, 519 F.2d 347, 349-50 (4th Cir. 1975); *Jackson* v. *United States*, 512 F.2d 772, 773 (5th Cir. 1975).

had any trouble with his hearing. There was no statement ever made that he had trouble with his hearing." (App. 65).

In addition, the affidavit of Vavolizza's attorney at the time of sentencing provides no support for the claim that he disobeyed any instructions of his client. While Muschio does state that he was retained for the purpose of advising Vavolizza whether he should withdraw his plea, Muschio states that he advised Vavolizza both prior to and at the time of sentencing that he should not withdraw his plea. There is no indication that Vavolizza did not know what his attorney was doing, especially after having been advised on two occasions by that attorney that he should not withdraw his plea.*

The belated nature of this claim, its patent absurdity and its lack of support in the record required its rejection. A hearing, in these circumstances, was plainly not required. See, *e.g.*, *Edge* v. *Wainright*, 347 F.2d 190, 192 (5th Cir. 1965), *cert. denied*, 385 U.S. 953 (1966).**

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* The Statement of Facts sets forth the curious evolution of Vavolizza's 1975 claim that he had not heard a remark of the Judge to his present claim that he was unable to hear anything including his own attorney's words at the time of his sentencing.

** It is also significant that the defendant's sole claim is that his attorney did not move to withdraw his guilty plea. Since Judge Tenney has already found that he would not have granted the motion to withdraw the plea had it been made (see App. 63), it would be patently absurd for this Court to grant the relief requested under Rule 32(d)—*i.e.*, withdrawal of the guilty plea—even if it were to conclude that Muschio had not followed the directions of his client.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

SARAH SCHRANK GOLD being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5 day of January 1977 she served 2 copies of the within brief and one copy of the motion papers by placing the same in a properly postpaid franked envelope addressed:

Salvatore Vavolizza
1031 Hollywood Avenue
Bronx, New York 10465

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sarah Schrank Gold

Sworn to before me this

5th day of January 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1841775
Qualified in Kings County
Commission Expires March 30, 1977